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October 15, 2002

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CC Docket No. 01-338

Dear Ms. Dortch:

On October 11, 2002, Pete Martin, Keith Milner, Jon Banks, Bob Blau and the undersigned, all representing BellSouth, and Bill Taylor with NERA, also representing BellSouth, met with Rob Tanner, Tom Navin, Julie Veach, Daniel Shiman and Ian Dillner from the Competition Policy Division of the Wireline Competition Bureau in connection with the above referenced proceeding. During this meeting, BellSouth explained that the unbundling requirements for transport and loop UNEs should be eliminated where alternatives exist and that the Commission should retain the local use requirements for loop-transport combinations and the commingling prohibition. BellSouth also explained how transport UNE relief would be provided under the Time Warner Telecom – BellSouth framework proposal. Regarding wireless carriers, BellSouth showed that wireless carriers have not been impaired without the availability of UNEs. Finally, under Section 251(d)(2), the Commission alone is responsible for evaluating impairment and determining which elements should be made available and, under Sections 251(d)(3) and 261(b), when the Commission removes an element, states have no authority to order the unbundling of that element.

I am electronically filing this notice, and the accompanying attachment used in this meeting, and request that you associate this notice with the record of the proceeding listed above.

Sincerely,



W. W. Jordan

Attachments

cc: Rob Tanner
Daniel Shiman

Tom Navin
Ian Dillner

Julie Veach

Transport and Loop UNES

BellSouth Corporation

October 11, 2002

Encouraging Investment and Facilities-Based Competition Serves the Public Interest and Should be the Goal of the FCC

- The Commission must consider, at a minimum, whether “the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.” –**1996 Act, §251(d)(2)**
- **Chairman Powell, 10/02/02 Remarks [as prepared for delivery] at the Goldman Sachs Communicopia XI Conference in New York, NY**
 - “[O]nly through facilities-based competition can an entity offer true product and pricing differentiation for consumers.”
 - “Only through facilities-based competition can our Nation attain greater network redundancies for security purposes and national emergencies.”
 - “We need service providers buying switches and other equipment from the Nortels, Luents and Ciscos.”

Encouraging Investment and Facilities-Based Competition Serves the Public Interest and Should be the Goal of the FCC

- The Commission seeks “to fashion a more targeted approach to unbundling that identifies more precisely the impairment facing requesting carriers,” and sought “comment on whether and how to take geography into account in the unbundling analysis” and “how to read the Act on a prospective basis.” – **2001 Triennial UNE Review NPRM**
- The legal basis for the impairment analysis espoused by the Chairman in 1999 and the granular approach outlined in the 2001 NPRM are confirmed because the 1999 UNE Remand Order never explained “why the record supports a finding of material impairment where the element in question—though not literally ubiquitous—is significantly deployed on a competitive basis.” – **U.S. Court of Appeals, USTA v. FCC 2002 (remanding 1999 UNE Remand Order)**
- “To rely on cost disparities that are universal as between new entrants and incumbents in any industry is to invoke a concept too broad...to be reasonably linked to the purpose of the Act's unbundling provisions.” – **U.S. Court of Appeals, USTA v. FCC 2002 (remanding 1999 UNE Remand Order)**

What Relief is Needed for Transport and Loops

- Eliminate unbundling requirements for transport and loops where alternatives exist
- Retain the “safe harbor” constraints for loop-transport combinations and stand-alone elements
- Commingling issues must be resolved in a manner that does not destroy special access with no benefit to local exchange competition

The FCC Has Recognized Competition in the Transport Marketplace

- Special Access Pricing Flexibility
 - Phase 1 and Phase 2 Transport Relief granted in:
 - 100% of BellSouth's national top 150 MSAs
 - 9 more BellSouth MSAs ranked above the national top 150

The Time Warner Telecom - BellSouth Framework Provides for Relief for Transport

- “Remove dedicated transport UNE where 3 or more competitive transport providers exist in either A or Z wire center”
 - Page 3 – TWTC-BellSouth Joint Ex parte
- Rationale: CLECs are not impaired where that amount of competition is present
- All carriers, both ILECs and CLECs, have a strong disincentive to invest where UNEs are mandated
- Safe Harbors must be retained

Providing Relief in the Top 100 MSAs Is a Comparable Alternative

- The TWTC-BLS Framework would require a data showing for each area
- Providing relief in the top 100 MSAs would provide comparable relief without the initial data showing, assuming Safe Harbors are retained in all areas
- The FCC could use the TWTC-BLS bright-line test for areas beyond the Top 100 MSAs
- Commingling issues must be resolved as noted previously

High Capacity Loops are Competitively Provisioned in the Top Metro Areas

- The FCC has found many markets for high capacity loops to be competitive
 - Phase 1 Relief Pricing Flexibility for Channel Terminations to End-User Premises
 - 100% of BellSouth national top 50 MSAs
 - 29 of 30 BellSouth national top 150 MSAs
 - 9 additional MSAs ranked above top 150
 - Phase 2 Relief Pricing Flexibility for Channel Terminations to End-User Premises
 - 6 of 8 BellSouth national top 50 MSAs
 - 20 of 30 BellSouth national top 150 MSAs
 - 6 additional MSAs ranked above top 150

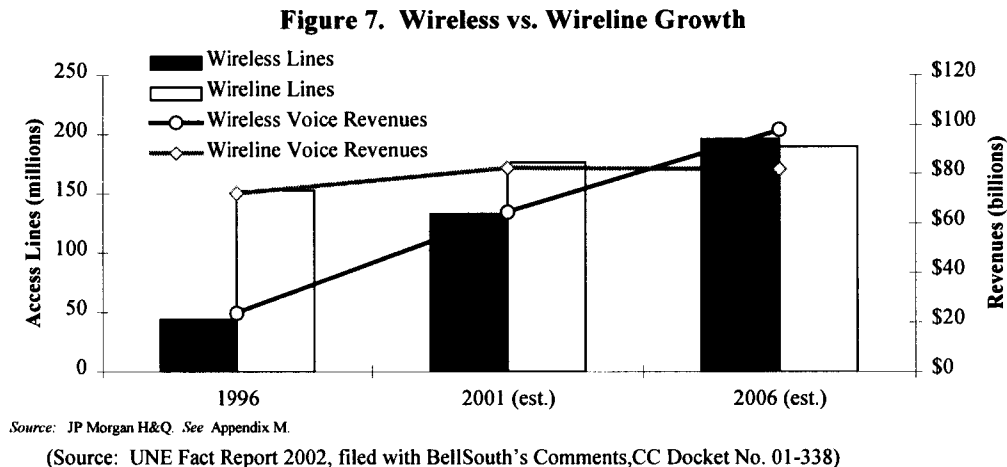
The Local Service Safe Harbors and Constraints on Commingling Should Be Retained

- Current federal policy correctly recognizes that the 1996 Act did not contemplate the substitution of special access service or switched access service with UNE analogs. “Contrary to the views of some commenters, section 251(d)(2) does not compel [the FCC], once [they] determine that any network element meets the “impair” standard for one market, to grant competitors automatic access to that same network element solely or primarily for use in a different market.” June 2, 2000, *Supplemental Order Clarification* (§ 15).
 - “Here, we must gather evidence on the development of the marketplace for exchange access in the wake of the new unbundling rules adopted in the *Third Report and Order* before we can determine the extent to which denial of access to network elements would impair carrier’s ability to provide special access services.” *Supplemental Order Clarification* (§ 16).
 - The DC Circuit Court (*USTA v. FCC*) instructs that a “more nuanced” concept of impairment would take into account specific markets or market categories; this supports the Commission’s legal analysis in the *Supplemental Order Clarification*.
 - Actual developments in the telecommunications marketplace, documented in the fuller record now before the Commission, demonstrate that IXC’s are not impaired in their provision of retail special access services.
- The Commission Should Not Reverse its Current Policy:
 - Universal service support would be impacted
 - Profound financial implications on both ILECs and facility based CLECs, “undercutting the market position of many facilities-based competitive access providers.” *Supplemental Order Clarification* (§ 18).
 - Would dampen investment and send distortive signals to market

Voice Grade Loops Have Intermodal Alternatives

- Wireless is increasingly a substitute for wireline
- 18% of cell phone users use cell phones as their primary lines, according to a recent *USA Today*/CNN/Gallup poll
(Source: UNE Fact Report 2002, citing M. Kessler, *18% See Cell Phones as Their Main Phones*, USA Today (Jan. 31, 2002))
- Intermodal competition is key
- Propping up intramodal competition should not be the goal
- Cable television providers are also increasingly providing voice telephony alternatives
 - Cable companies are beginning to chalk up impressive results in signing up telephone subscribers
 - Cable companies are luring customers away from local phone companies
 - Two cable industry leaders, AT&T Broadband and Cox, have signed up over 1.7 million local telephone customers and are adding new ones at a rate of more than 60,000 a month
 - Other industry leaders plan to launch cable phone service next year using a less expensive Internet-based technology
(Source: Wall Street Journal, September 5, 2002)
- A sunset for voice grade loops in areas served by multiple carriers should be instituted

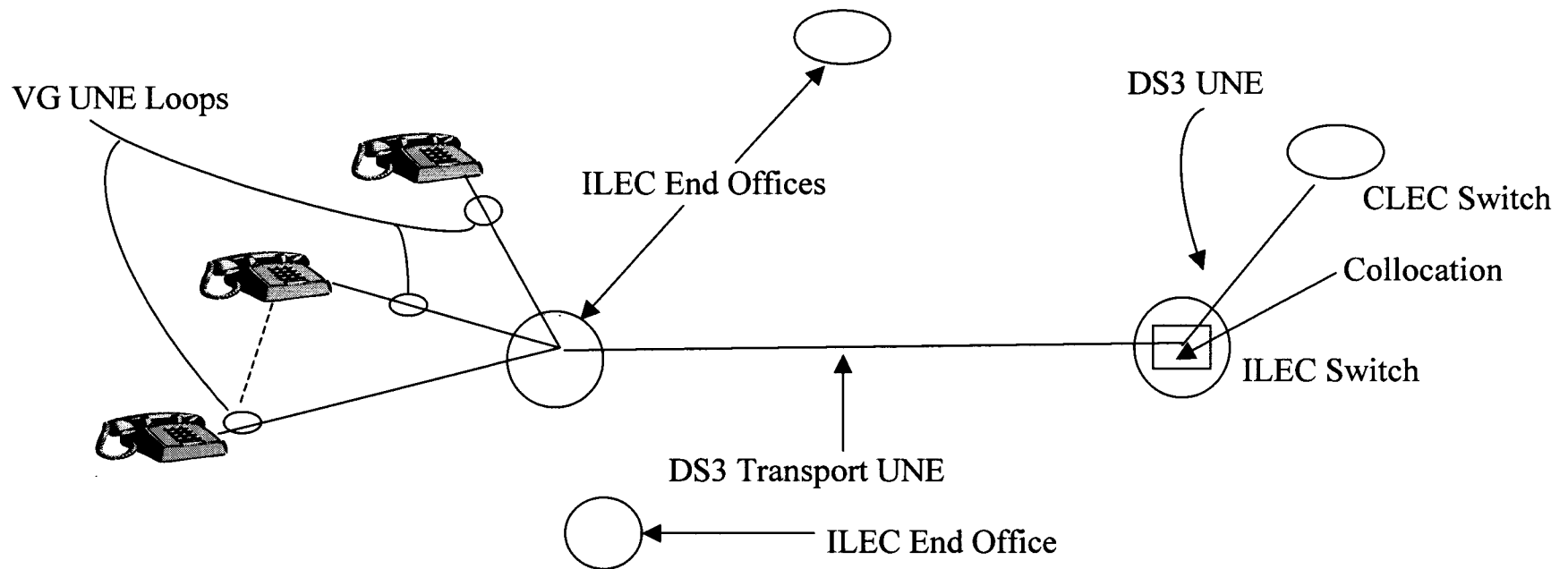
Wireless Carriers Are Not Impaired Without UNEs



- Wireless Carriers are not impaired – they are serving the market today and have over 130 million line equivalents
- “[M]andating the element’s unbundling in every geographic market and customer class, without regard to the state of competitive impairment in any particular market...[will result in UNEs being available] to CLECs in many markets where there is no reasonable basis for thinking that competition is suffering from any impairment of a sort that might have [been] the object of Congress’s concern.” – D.C. Circuit Court, USTA v. FCC

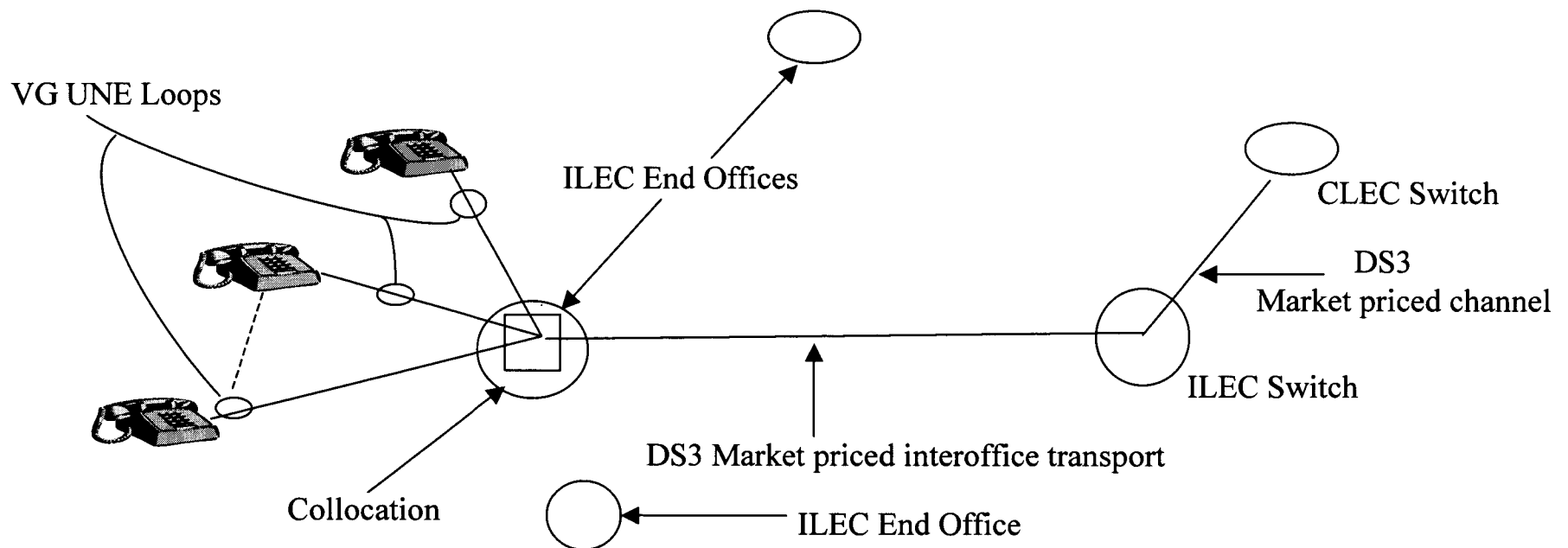
Use of UNE-L to Serve Local Exchange Customers

Scenario 1: Transport UNEs Remain (i.e. – impairment test not met)



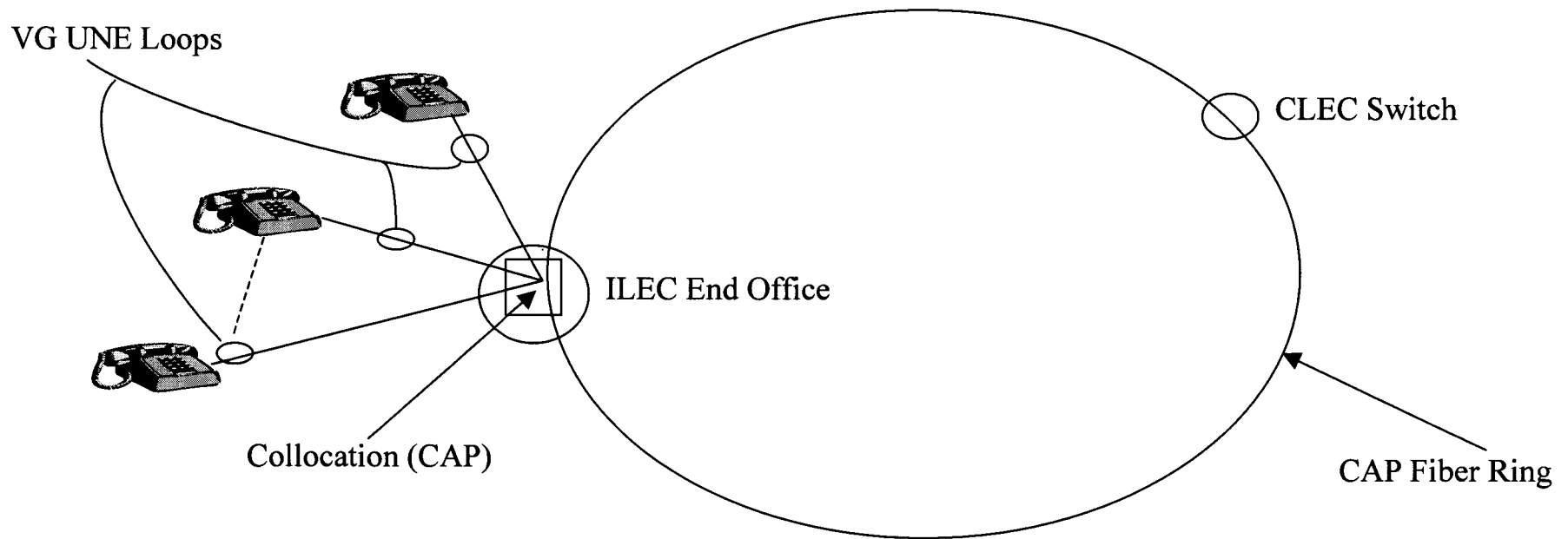
Use of UNE-L to Serve Local Exchange Customers

Scenario 2: Transport UNEs removed from list, and CLEC chooses to use ILEC market priced interoffice transport



Use of UNE-L to Serve Local Exchange Customers

Scenario 3: CLEC purchases transport from non-ILEC Source



Key Conclusions

- If UNE Switching is eliminated, CLECs could use UNE-L and transport to reach a centralized switch
- Transport Relief can accompany Switching Relief:
 - Any CLEC providing local service to end-user customers will not be hampered by local service use restrictions
 - Local usage safe harbors need not be removed
 - Transport UNE relief would have minimal impact on CLECs serving end-user customers
 - Relief must be granted where there is no impairment
 - Connection of voice-grade loop UNEs to high capacity market-priced interoffice transport could eliminate the need for CLEC collocation in end-offices

Telecom Sector Needs Uniform UNE Structure for Recovery

- Inconsistent state proceedings waste money and stretch limited resources
 - CLECs initiated dockets to “restore” local switching in Tennessee, Georgia and Louisiana; Tennessee has “restored” OS/DA
 - In state proceedings, CLECs have attempted to unbundle packet switching in all nine BellSouth states
 - Alabama, Florida, Georgia, Kentucky, Louisiana, Tennessee have required or are considering requiring provision of DSL over UNE-P
 - In BellSouth’s 9 states alone, CLECs initiated nearly 50 UNE dockets to expand the federal “list” after the 1999 UNE Remand Order
- “Pocket veto by state regulators will ensure that the goals of increased competitive choice, reasonable price and availability of services will not be met. It will cause continued uncertainty in the market and prolong the telecom market’s decline.” (Source: Gartner Dataquest, “UNEs: Stifling US Broadband Growth and Ineffective in Promoting Local Competition,” Market Analysis (Feb. 27, 2002))

States Cannot Require Unbundling Where the FCC Has Found Non-Impairment

- Under Section 251(d)(2), the FCC alone is responsible for evaluating impairment and determining which network elements should be made available
- As USTA makes clear, unbundling in the absence of impairment creates severe social costs, including diminished investment, innovation, and facilities-based competition
- Consequently, once the FCC has found non-impairment or otherwise declined to mandate unbundling, the states may not disregard that determination
- Sections 251(d)(3) and 261(b) confirm that the states have no authority to order unbundling in such circumstances
 - These provisions only permit state requirements that are consistent with Section 251 and do not substantially prevent implementation of Section 251 and the purposes of the Act's local competition requirements
 - Because overbroad unbundling is antithetical to the Act's purposes and Section 251 leaves unbundling determinations to the FCC, state decisions that "reverse-preempt" a FCC decision not to require unbundling are void on their face
- Additional policy concerns likewise support FCC occupation of the field with respect to network unbundling
 - The industry needs more regulatory certainty, not less
 - The FCC correctly has sought to prevent wasteful and duplicative state proceedings, yet several PUCs already have adopted or proposed additional unbundling requirements at the urging of CLECs

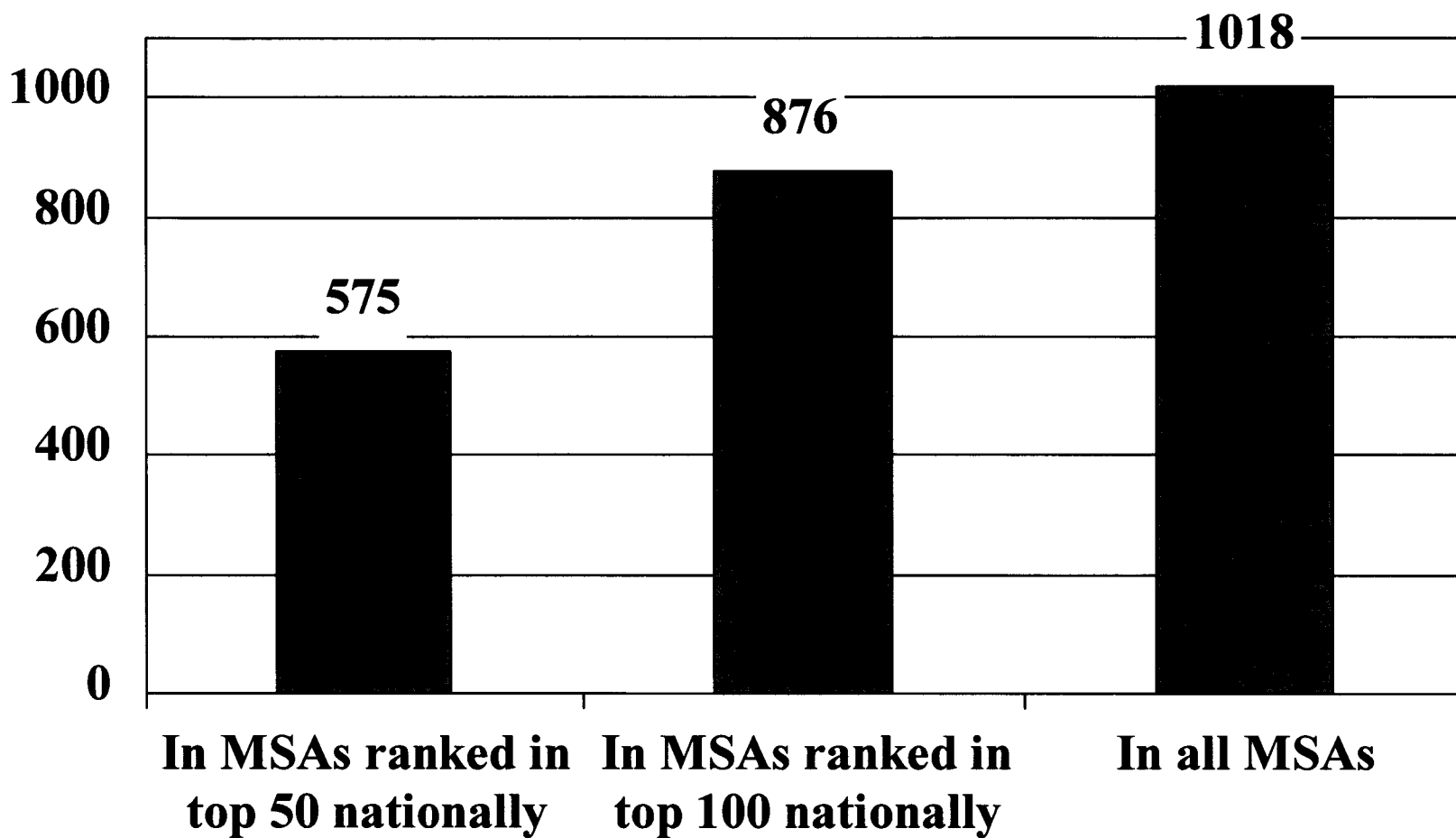
Penetration of CLEC Transport Can be Measured in At Least Three Ways

- Fiber-based CLEC collocation
- CLEC-supplied fiber
- Wholesale supply of fiber from non-CLEC sources

Marketplace Evidence on CLEC Transport: Fiber-based CLEC Collocation

- 1,018 fiber-based collocation arrangements in BellSouth's 64 MSAs (excluding such arrangements in rest of BellSouth region outside MSAs).
- The 20 BellSouth MSAs ranked in the top 100 nationally account for 86 percent of all fiber-based collocation arrangements in BellSouth's MSAs.
- Of BellSouth's 64 MSAs, 42 have fiber-based collocation arrangements.
- 4177 collocation arrangements (fiber-based + others) in the BellSouth region as of 7/31/02.

Fiber-Based Collocation Arrangements in BellSouth Region MSAs



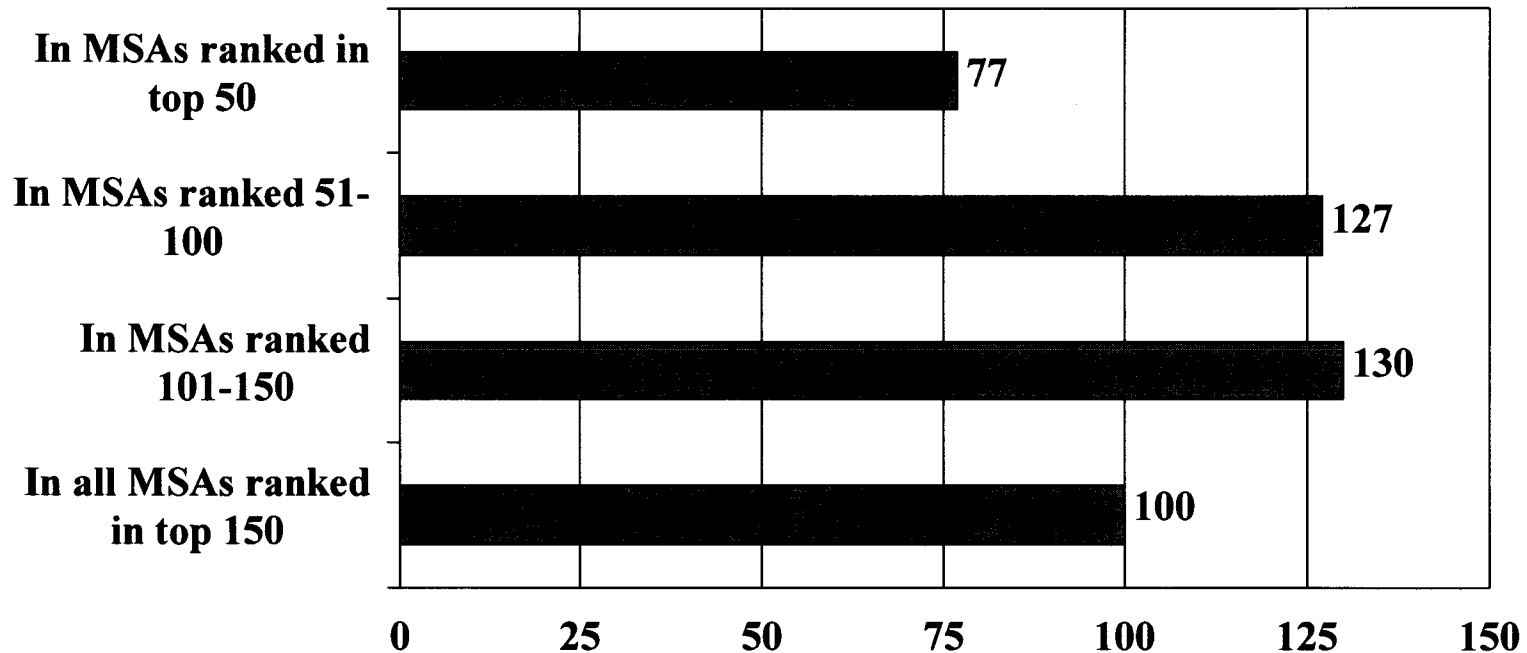
Marketplace Evidence on CLEC Transport: CLEC-Supplied Fiber

- Collocation-based measures do not account for considerable traffic bypassing RBOC wire centers completely.
 - If it is economical for a CLEC to run competitive fiber to an RBOC wire center, it is often economical to extend that fiber to end-users, data ISPs, other carriers, etc.
 - Many private customers generate sufficient traffic to justify their own fiber-optic connections.
 - CLEC networks use “Collocation Hotels” – often as large or larger than RBOC wire centers
 - Data traffic at “Collocation Hotels” is growing at 100 percent annually.

Marketplace Evidence on CLEC Transport: CLEC-Supplied Fiber (Cont'd)

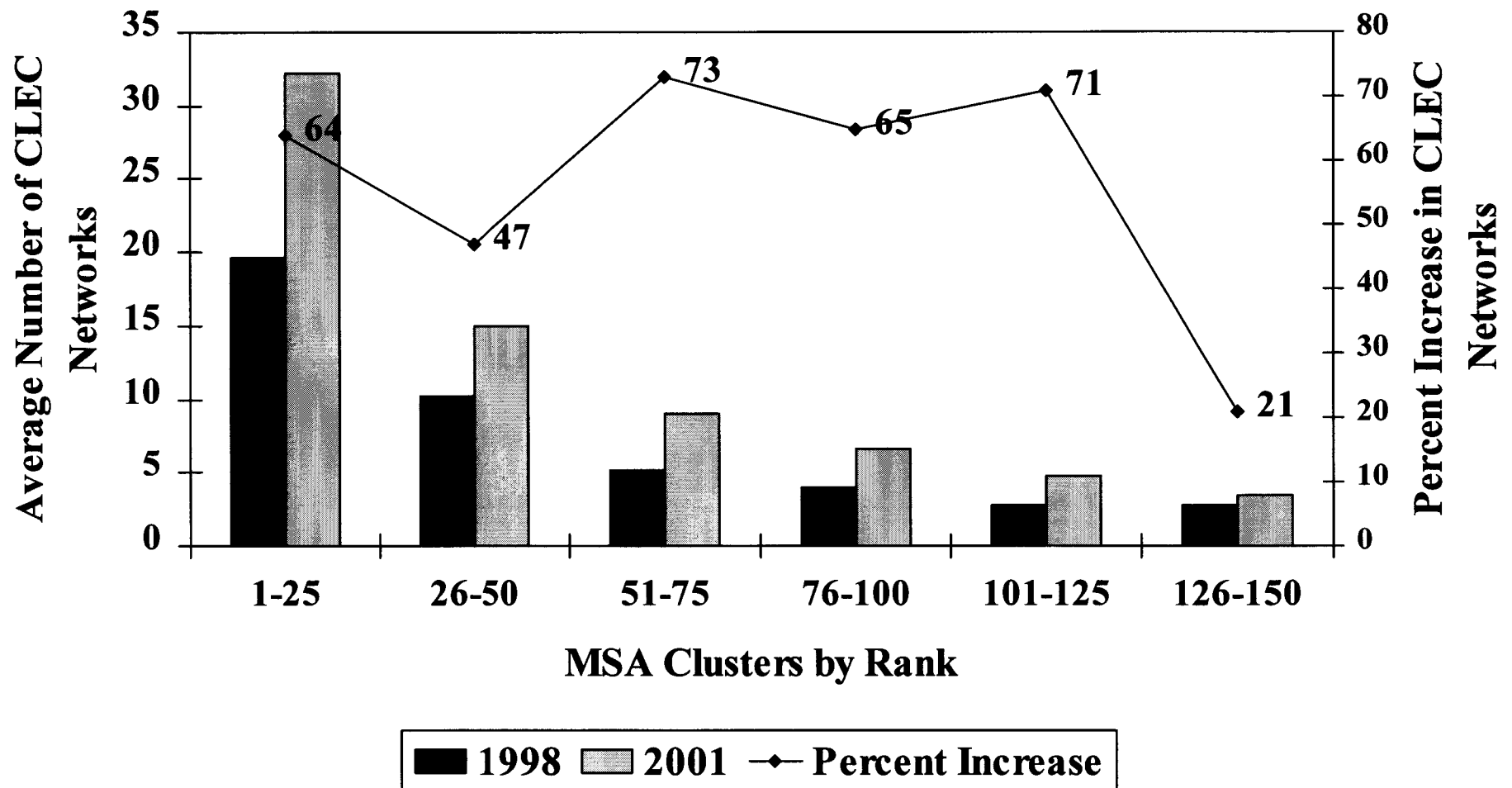
- Different points of traffic concentration (e.g., Collocation Hotels) significantly increase competition in transport
 - Provides economies of scale to small competitors
 - CLEC no longer has to grow organically
 - Major competitive providers are likely to route their network to concentration points, thereby providing connections to all points served by all competitive networks combined.
 - Intermediaries can bundle and resell transport
 - Universe of competitive fiber defines geographic areas within which competitive transport is now available

Percent Change in the Number of CLEC Networks in BellSouth's Region 1998-2001



- Slower growth rate in top 50 MSAs explained by CLEC network growth in those MSAs prior to 1998

Average Number of CLEC Networks by MSA Clusters Nationwide



Marketplace Evidence on CLEC Transport: Wholesale Supply of Fiber from Non-CLEC Sources

- Coalition of Competitive Fiber Providers
 - Five alternative fiber suppliers provide competitive fiber-based transport services and dark fiber to CLECs collocated in ILEC central offices
- 13 of the 16 largest BellSouth MSAs have non-CLEC wholesale local fiber suppliers
- Three utilities provide fiber in the BellSouth region
- IXCs in the four largest BellSouth MSAs supply dark fiber to the industry

BellSouth's Recommendation Would Serve the Public Interest

- Provide an incentive for investment
- Provide a path to facility based competition rather than arbitrage based competition
- Provide consumers with truly differentiated alternatives
- Provide regulatory certainty
- Stop the industry deflation caused by regulatory fiat